STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Michael Smolenski, Kathleen Jansen, and E. Thomas Fitzgerald, JJ

AUTO -OWNERS INSURANCE COMPANY,

Plaintiff-Appellant, Docket No. **119403**

v

AMOCO PRODUCTION COMPANY,

Defendant-Appellee.

BRIEF ON APPEAL – AMICUS CURIAE
AUTO CLUB INSURANCE ASSOCIATION

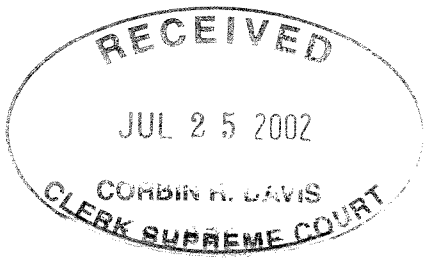

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TABLE OF CONTENTS

PAGE(S)

INDEX OF AUTHORITIES

CASES **PAGE(S)**

STATUTES, COURT RULES AND OTHER AUTHORITIES

STATUTES, COURT RULES AND OTHER AUTHORITIES (Cont.) **PAGE(S)**

STATEMENT OF QUESTION PRESENTED

I. WHEN AN EMPLOYEE'S NO-FAULT AUTOMOBILE INSURER PAYS THE EMPLOYEE'S INJURY-ACCIDENT MEDICAL EXPENSES THAT SHOULD HAVE BEEN PAID BY HIS EMPLOYER THROUGH WORKERS' COMPENSATION, IS THE NO-FAULT INSURER ENTITLED TO FULL REIMBURSEMENT PURSUANT TO THE SPECIAL REMEDIAL PROVISIONS OF § 315(1) OF THE WORKER'S DISABILITY COMPENSATION ACT?

Plaintiff-Appellant answers, "Yes."

Defendant-Appellee answers, "No."

The Court of Appeals answered, "No."

Amicus Curiae ACIA answers, "Yes."

STATEMENT OF INTEREST OF AMICUS CURIAE

The Auto Club Insurance Association, also known as "AAA," is one of Michigan's major underwriters of no-fault automobile insurance, writing approximately 20-25% of all of the automobile policies purchased by Michigan residents. Accordingly, the Auto Club has an obvious interest in the correct interpretation and application of any law affecting no-fault insurance, no-fault insurers, and no-fault insureds.

The Auto Club is interested in this particular matter because the decisions below interpret the remedial (medical expense) reimbursement language of § 315(1) of the Worker's Disability Compensation Act in such a way as to deny full reimbursement to an (excess) no-fault insurer that steps up and pays an injured person's medical expenses in place of the (primary) workers' compensation insurer that defaulted on its responsibility to pay those expenses.

The employer or workers' compensation insurer (here, Amoco) could have paid off the medical providers' bills at reduced workers' compensation rates. But the employer did not pay, thereby leaving the medical debts to the insured or some other payor. When the no-fault insurer (here, Auto-Owners) paid the medical bills, that insurer was not entitled to pay those bills at the reduced workers' compensation rate but had to pay the bills in full at ordinary reasonable rates. Then, when the no-fault insurer sought reimbursement from the employer, it was awarded reimbursement not in the full amounts paid but rather at the reduced workers' compensation rate.

All of the reimbursement decisions to date in this matter "reward" the (primary) defaulting employer by allowing it to belatedly pay the medical bills at the same reduced workers' compensation rate it should have paid at initially, and those decisions "punish" the (excess) no-fault insurer by leaving it responsible and unreimbursed for the additional amounts (in excess of the workers' compensation rate) that it was required to pay and which would not have had to have been paid if the employer had paid in the first instance.

The current result in this case is obviously prejudicial to no-fault insurers and only serves to chill the willingness of any excess insurer to step up and pay in the place of the defaulting employer or workers' compensation insurer.

Amicus Auto Club believes that, as explained infra, all of the decisions below in this case reflect a clear misunderstanding and misinterpretation of Michigan law on this medical expense reimbursement issue.

STATEMENT OF FACTS

The basic facts pertinent to this case on appeal are simple, straightforward, and appear to be undisputed. They can be drawn largely from the Court of Appeals decision in this case. Auto-Owners Ins Co v Amoco Production Co, 245 Mich App 171; 628 NW2d 51 (2001).

Leroy Smithingell, an employee of Defendant-Appellee Amoco Production Company ("Amoco"), was injured in a motor vehicle accident, as he was arriving at work, on the morning of January 30, 1994. The accident involved only Mr. Smithingell's vehicle, and it occurred while he was in the process of parking the vehicle in Amoco's parking garage. (245 Mich App, at 173).

Amoco, the employer and self-insured workers' compensation provider, did not furnish Mr. Smithingell's medical care by paying his medical expenses through workers' compensation (1a-4a, 20a).

However, Plaintiff-Appellant Auto-Owners Insurance Company ("Auto-Owners"), Mr. Smithingell's no-fault automobile insurer, furnished no-fault personal protection insurance (PIP) benefits to Mr. Smithingell, including the payment of his medical expenses (245 Mich App, at 173).

Then, on October 20, 1994, Auto-Owners petitioned the Bureau of Workers' Disability Compensation for a determination that Mr. Smithingell's injury-accident occurred in the course of his employment and that Amoco was therefore liable in workers' compensation for, inter alia, the medical expenses that were paid by Auto-Owners (245 Mich

App, at 173; 1a, 3a).

In an opinion mailed May 30, 1995, the workers' compensation magistrate ruled, inter alia, that Mr. Smithingell's injury arose out of and in the course of employment, and that Auto-Owners was therefore entitled to reimbursement from Amoco for medical expenses paid, but that the reimbursement is subject to the "cost-containment rules" – i.e., reimbursement is at the reduced workers' compensation medical expense payment rates and not in the full amounts Auto-Owners actually paid (245 Mich App, at 173-174; 18a-22a).

On appeal by Auto-Owners, the Workers' Compensation Appellate Commission (WCAC), in an opinion and order dated April 17, 1998, affirmed the magistrate's decision (245 Mich App, at 172-173, 174; 23a-28a).

From the WCAC decision, Auto-Owners applied for leave to appeal. On November 6, 1998, the Court of Appeals remanded this case to the WCAC for reconsideration. In an opinion on remand dated February 22, 1999, the WCAC reached the same conclusions as before. Auto-Owners again applied for leave to appeal, and the Court of Appeals, in an order dated May 25, 1999, again remanded the case for reconsideration of the rate-of-medical-reimbursement issue only. In an opinion dated October 22, 1999, the WCAC again reached the same conclusions (245 Mich App, at 174; 29a-39a).

Auto-Owners once again applied for leave to appeal. The Court of Appeals granted the application on April 7, 2000. (245 Mich App, at 175; 40a). Then, in a published precedential opinion released March 27, 2001, the Court of Appeals affirmed the

reimbursement rulings of the hearing magistrate and the WCAC and remanded for further findings regarding the correct amount of medical expenses paid by Auto-Owners. Auto-Owners Ins Co v Amoco Production Co, supra, 245 Mich App, at 172-173, 179-180.

From the Court of Appeals decision in this case, both Auto-Owners and Amoco applied to this Court for leave to appeal. Both applications were granted by separate orders of this Court dated April 30, 2002 (47a-48a).

In this appeal (No. 119403) by Auto-Owners from the medical expense reimbursement decisions below, the Auto Club Insurance Association ("Auto Club"), as Amicus Curiae, submits this Brief in support of Auto-Owners' appeal.

I. WHEN AN EMPLOYEE'S NO-FAULT AUTOMOBILE INSURER PAYS THE EMPLOYEE'S INJURY-ACCIDENT MEDICAL EXPENSES THAT SHOULD HAVE BEEN PAID BY HIS EMPLOYER THROUGH WORKERS' COMPENSATION, THE NO-FAULT INSURER IS ENTITLED TO FULL REIMBURSEMENT PURSUANT TO THE SPECIAL REMEDIAL PROVISIONS OF § 315(1) OF THE WORKER'S DISABILITY COMPENSATION ACT.

INTRODUCTION AND SUMMARY OF ARGUMENT

Leroy Smithingell was injured in a work-related motor vehicle accident for which he incurred medical expenses. His employer, Amoco, failed to pay those medical expenses through workers' compensation. Instead, his no-fault insurer, Auto-Owners, paid the medical bills. Auto-Owners sought reimbursement from Amoco by way of this case.

The workers' compensation hearing magistrate, the Workers' Compensation Appellate Commission, and the Court of Appeals all recognized that Amoco was responsible, primary, and owed Auto-Owners the reimbursement, but they all held that Auto-Owners was not entitled to full reimbursement of the actual amounts expended to pay the medical bills – just reimbursement limited to the workers' compensation cost-containment rules or rates of payment to medical care providers.

Had Amoco, as Mr. Smithingell's employer and workers' compensation provider, paid the medical bills in the first instance as required, Amoco would have been able to pay the bills in full at the reduced workers' compensation rates authorized by the cost-containment provisions of the Worker's Disability Compensation Act, MCL 418.315(2).

But since Amoco did not pay, Auto-Owners paid instead. And because Auto-Owners is a no-fault insurer and not a workers' compensation insurer, Auto-Owners could not avail itself of the reduced workers' compensation payment rates and had to pay Mr. Smithingell's medical expenses at the full "reasonable" billed amounts. MCL 500.3107(1)(a); Munson Medical Center v Auto Club Ins Ass'n, 218 Mich App 375; 554 NW2d 49 (1996), lv den 453 Mich 959 (1996).

Auto-Owners sought full reimbursement by invoking the remedial provisions of § 315(1) of the Worker's Disability Compensation Act which provides for full reimbursement when the employer, as here, defaults on its medical care obligation. MCL 418.315(1).

But the workers' compensation hearing magistrate, the Workers' Compensation Appellate Commission, and the Court of Appeals all held that the at-issue remedial statutory full-reimbursement language only applies when the "employee" personally pays the medical bills. Accordingly, because Auto-Owners, an excess or secondarily-responsible no-fault insurer and not the "employee," paid the bills, Auto-Owners was awarded reimbursement at only the reduced workers' compensation cost-containment rates, and not in the full reasonable amounts of the bills as actually paid by Auto-Owners on behalf of Mr. Smithingell.

For all of the reasons explained infra, Amicus Curiae Auto Club respectfully submits that the legal analysis or distinction drawn by each of the decisions below in this matter is unfair, illogical, and, more importantly, a misreading of the at-issue statutory language and

a misapplication of traditional principles of equitable subrogation.

STANDARD OF REVIEW

The rate-of-reimbursement issue before this Court is a purely legal issue. It involves both statutory construction and application of the doctrine of equitable subrogation. Accordingly, this Court reviews the decisions below de novo for legal error. Hoste v Shanty Creek Management, Inc, 459 Mich 561, 569; 592 NW2d 360 (1999); Alex v Wildfong, 460 Mich 10, 21; 594 NW2d 469 (1999); Hartford Accident & Indemnity Co v Used Car Factory, Inc, 461 Mich 210, 215 n 5; 600 NW2d 630 (1999).

A. THE REMEDIAL LANGUAGE OF MCL 418.315(1) DIRECTLY ENTITLES AUTO-OWNERS TO THE FULL REIMBURSEMENT IT SEEKS.

The Worker's Disability Compensation Act ("WDCA") requires the employer to pay the medical expenses of an employee who suffers a work-related injury. MCL 418.315(1).

In an effort to lower or limit the employer's medical cost burden, the WDCA contains a "cost-containment" provision:

> "(2) Except as otherwise provided in subsection (1), all fees and other charges for any treatment or attendance, service, devices, apparatus, or medicine under subsection (1), are subject to rules promulgated by the bureau of worker's compensation pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The rules promulgated shall establish schedules of maximum charges for the treatment or attendance, service, devices, apparatus, or medicine, which schedule shall be annually revised. A health facility or health care provider shall be paid either its usual and customary charge for the treatment or attendance, service, devices, apparatus, or

> medicine, or the maximum charge established under the rules, whichever is less."

MCL 418.315(2).

In short, an employer, in carrying out its statutory workers' compensation medical care obligation, enjoys the protection of special (i.e., lower) workers' compensation rates that must be accepted by medical care providers as payment in full for their services. See also 2000 AACS, R 418.10105.

But what happens when, for some reason, the employer doesn't carry out its workers' compensation medical care obligation, and, as a result, medical expenses are incurred, billed, and paid by someone other than the employer and at the medical provider's ordinary rate which is in excess of the workers' compensation rate?

The WDCA appears to specifically provide for that situation by requiring the employer to belatedly fulfill its obligation by making the necessary reimbursement not at the otherwise applicable special workers' compensation rate but rather in the amount of "the reasonable expense [actually] paid":

> ". . . If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf o f the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee."

MCL 418.315(1).

In other words, by failing to properly discharge its obligation, the employer loses the

benefit of the workers' compensation cost-containment provisions and becomes responsible for paying the increased amount (i.e., the difference between the workers' compensation rate and the higher reasonable charge actually incurred) that was necessitated by its failure to pay.

But in the instant case, each of the decisions below refused to apply the above-quoted remedial language of MCL 418.315(1). It is undisputed that the employer (Amoco) had erroneously refused to pay its employee's (Leroy Smithingell's) medical bills through workers' compensation. It is also undisputed that the employee's no-fault insurer (Auto-Owners) paid the medical bills in place of the employer but without the benefit of the lower workers' compensation rate. Nevertheless, the decisions below all held that Amoco was required to reimburse Auto-Owners only at the reduced workers' compensation rate and not at the higher reasonable amount actually paid by Auto-Owners.

In reaching this conclusion in the instant case and thereby affirming the decisions below, the Court of Appeals reasoned that the purpose of the at-issue remedial statutory language is "clearly to protect employees who pay for medical expenses for which the employers are responsible to pay" Auto-Owners, supra, 245 Mich App, at 175 (emphasis added), and, since Plaintiff Auto-Owners is not the "employee" but only the employee's no-fault insurer, Auto-Owners is not entitled to the benefit of the full-reimbursement remedial language of MCL 418.315(1), supra. According to the Court of Appeals, the statute is "designed to protect employees," and, since Plaintiff "is not an employee," Plaintiff "is not

protected by [MCL 418.315(1)]" (245 Mich App, at 177).

Thus, there does not seem to be any question that if the employer defaults and the employee is left to personally pay medical bills at reasonable but higher than workers' compensation rates, the employee is entitled to full reimbursement from the employer. But the rule of law to be gleaned from the Court of Appeals decision in this case is that if the same payment is made by a secondarily-responsible payor (such as Auto-Owners) on behalf of the employee, then the full reimbursement by the employer is not owing but only reimbursement at the reduced workers' compensation rates.

Amicus Curiae Auto Club respectfully submits that this analysis by the Court of Appeals is not good statutory construction – indeed, it fails to take into account the full scope of the plain statutory language, and it even works to frustrate the very purpose of the statute as articulated by the Court of Appeals.

The cardinal rule of statutory construction is to identify and give effect to the intent of the Legislature. Where possible, that intent should be drawn from the plain meaning of the statutory text. If the statutory language is not ambiguous, judicial construction is neither required nor permitted, and the statute should be applied as written. Turner v Auto Club Ins Ass'n, 448 Mich 22, 27; 528 NW2d 681 (1995). When ambiguity makes construction necessary, an interpretation of a portion of the statutory language should be avoided, if at all possible, that ignores, conflicts with, or renders nugatory any other portion of the statute. Turner, supra, 448 Mich, at 27-28; Hoste, supra, 459 Mich, at 574.

First of all, if we simply examine the text of the statute, we can see that the statutory remedy is explicitly not limited to reimbursement of only the "employee":

> ". . . If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee."

MCL 418.315(1) [emphasis added].

The above-quoted language clearly contemplates belated payment by the neglectful employer either to the "employee" or "in behalf of the employee to persons to whom the unpaid expenses may be owing." Why wouldn't Auto-Owners qualify as a person to whom Amoco owes the payment for the expenses Amoco owed but did not previously pay? And there is no language in this statute indicating that, when the neglectful employer is ordered to make its amends, it loses its special statutory rate protection only in making its late payment to the "employee" but not when making the late payment "in behalf of the employee."[1]

Secondly, any lack of explicitness regarding the scope of the statutory remedy should not inure to the detriment of the employee and to the benefit of the neglectful employer. It is undisputed that the obvious purpose of the at-issue statutory provision is to protect (at

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[1] If the medical care provider's bill has not yet been paid (at a higher than workers' compensation reasonable rate) by the employee or any secondary payor, there is no reason why the employer could not still pay the provider at reduced workers' compensation scheduled rates, as no additional medical expense has yet been incurred by anyone due to the employer's default.

least) the employee from suffering the loss of the additional incremental medical expense incurred as a result of the employer's failure to timely provide payment for the medical expenses at the lower workers' compensation rate. If the employee suffers the additional expense contemplated by the statutory remedy, but the employee's expenses are fortuitously covered by a secondary or excess payor (here, Auto-Owners) who steps up to the plate, the employee has still incurred the additional loss, and that additional loss should remain the responsibility of the employer that caused the loss, regardless of whether the employee has directly or indirectly paid the (enhanced) medical expenses.

The Court of Appeals' restrictive reading of the statutory remedy in this case can only work to the ultimate detriment of employees, as the Court of Appeals' holding tells secondary payors that their voluntary interim payment of an employee's workers'-compensation-covered medical bills is made at the peril of subsequent inadequate reimbursement. Any such chilling effect on the payment of the employee's medical bills by secondary payors and any such windfall to the neglectful primary responsible employer does not effectuate the legislative intent reflected in MCL 418.315(1).

The traditional rule of statutory construction is that when there is statutory ambiguity and therefore room for statutory construction, a remedial statutory provision such as MCL 418.315(1) must be liberally construed to effectuate the Legislature's intent. Turner v Auto Club Ins Ass'n, supra, 448 Mich, at 28. Here, the Court of Appeals appears to have gone in precisely the opposite interpretational direction, construing the statutory remedy in a highly

and artificially restrictive way that not only is illogical and unfair, it actually does violence to some of the statutory language, as explained supra.

The Court of Appeals was misled in this case by its stated desire to "accord great weight to the administrative interpretation of the statute unless that interpretation is clearly wrong" (245 Mich App, at 175). Here, statutory textual clues erroneously lost out to the Court's sense of deference to the administrative decisions below.

Deference to administrative interpretation is fine in the right case. But here the Court of Appeals committed the same error noted in the very case that it relied on for that principle. In Hoste, supra, 459 Mich, at 574, this Court expressly warned against the "consequential omission" of failing to give meaning to every word of a statute.

The administrative decisions in this case are less than fully analytical. They focus only on the obvious statutory reference to the "employee." Similarly, the Court of Appeals opinion refers to an applicable administrative rule that focuses only on the "employee":

> "Notwithstanding any other provision of these rules, if an employee has paid for a health care service and at a later date a carrier is determined to be responsible for the payment, then the employee shall be fully reimbursed by the carrier."

1988 AACS, R 418.2102, quoted in the instant Court of Appeals opinion, 245 Mich App, at 176.

Lost in these administrative references is the subtlety, nuance, and complete scope of the entire at-issue controlling statutory provision. The result: an erroneously restrictive interpretation of the statutory language and frustration of the Legislature's actual remedial

intent.

The Court of Appeals also erred in finding, without a statutory basis, a prejudicial distinction between an "employee" and "sophisticated insurers such as plaintiff" Auto-Owners (245 Mich App, at 176-177). This issue has nothing to do with the "sophistication" of the medical bill payor. Auto-Owners paid on behalf of the employee and in place of the employer because, as the employee's automobile no-fault insurer, it was obligated, albeit secondarily,[2] to provide coverage for the employee's medical bills. Specht v Citizens Ins Co of America, 234 Mich App 292; 593 NW2d 670 (1999). And, because Auto-Owners was not the workers' compensation carrier, Auto-Owners absolutely could not avail itself of the workers' compensation rate in paying medical bills and instead had to pay the medical bills at the same "reasonable" rate that the employee would personally have to pay. Munson, supra.

It is most ironic that the Court of Appeals actually used the Munson case, supra, to support its analysis of this issue against Auto-Owners:

> "In Munson Medical Center v Auto Club Ins Ass'n, 218 Mich App 375, 390; 554 NW2d 49 (1996), this Court held that no-fault insurance carriers are not entitled to invoke the cost containment provisions of the WDCA and may not limit reimbursement to medical providers according to the worker's compensation scheme 'given the controlling statutory language of the no-fault act.' The amount that plaintiff is entitled to set off from its no-fault payments is determined by reference to the WDCA, and the WDCA incorporates cost containment

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[2] Workers' compensation is primary coverage per MCL 500.3109(1); Mathis v Interstate Motor Freight System, 408 Mich 164, 176, 186-187; 289 NW2d 708 (1980).

> provisions in § 315. Consequently, we hold that plaintiff's reimbursement is limited by the cost containment rules set forth in the WDCA."

Auto-Owners, supra, 245 Mich App, at 178.

According to the above quotation, the Court of Appeals recognizes that a no-fault insurer (like Auto-Owners), since it is not a workers' compensation insurer, cannot pay medical bills at the reduced workers' compensation rates. The Court also recognizes that no-fault benefits coordinate with workers' compensation [MCL 500.3109(1)]. Then, the Court concludes that because no-fault coordinates with workers' compensation, and because workers' compensation incorporates the cost-containment provisions of MCL 418.315(2), a no-fault carrier such as Auto-Owners is limited to the workers' compensation cost-containment rates with respect to any reimbursement.

This quotation demonstrates that the Court of Appeals has completely misunderstood the implications of Munson and the interaction of no-fault with workers' compensation. Of course the WDCA "incorporates" or includes the cost-containment provisions of MCL 418.315(2); but it also includes the remedial provisions of MCL 418.315(1) for situations like the instant case where an employer defaults on its workers' compensation payment obligation. The Court of Appeals also confuses a no-fault insurer's "reimbursement" of a medical provider with the "reimbursement" that the no-fault insurer is entitled to receive from the employer or workers' compensation insurer. The Court of Appeals also does not appear to understand that, if the employer had complied with its primary obligor status and

had paid the medical bills, at the reduced workers' compensation rates, the medical bill would have been paid in full, and there would have been nothing left for the no-fault insurer to pay with regard to that bill. See, e.g., Bombalski v Auto Club Ins Ass'n, 247 Mich App 536, 543-546; 637 NW2d 251 (2001). The Court of Appeals does not appear to understand that that outcome (i.e., nothing owed by the no-fault insurer on a workers' compensation covered medical bill) should not change just because the workers' compensation insurer defaults and has to be ordered to pay.

B. ALTERNATIVELY, AUTO-OWNERS IS DERIVATIVELY ENTITLED TO FULL REIMBURSEMENT BY APPLICATION OF THE DOCTRINE OF EQUITABLE SUBROGATION.

Even if the at-issue remedial statutory provision, MCL 418.315(1), only contained language providing for a full reimbursement right of the "employee" (here, Mr. Smithingell), and contained no additional language expressly expanding that right to other "persons" (such as Mr. Smithingell's no-fault insurer, Appellant Auto-Owners) to whom payment is owed "in behalf of the employee" (see Issue/Argument I-A, supra), the absence of such an express or direct right would not resolve the issue of Appellant Auto-Owners' reimbursement right because we also have in this case the alternative issue of Auto-Owners' derivative entitlement as subrogee of "employee" Smithingell.

"Subrogation" is traditionally defined as "the substitution of one person in the place of another with reference to a lawful claim, demand or right, . . . so that he who is

substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." Yerkovich v AAA, 461 Mich 732, 737; 610 NW2d 542 (2000). The "subrogee" or substitute stands in the shoes of, and acquires no greater rights than those possessed by, the "subrogor." Yerkovich, supra, 461 Mich, at 737.

One type of subrogation is "equitable subrogation," a "flexible, elastic doctrine of equity." Hartford Accident & Indemnity Co v Used Car Factory, Inc., supra, 461 Mich, at 215.

"Equitable subrogation" has been repeatedly defined as a legal fiction through which a person, who is not a mere volunteer and who pays a debt for which another is primarily responsible, is substituted or subrogated to all the rights and remedies of the other. Hartford, supra, 461 Mich, at 215; Commercial Union Ins Co v Medical Protective Co, 426 Mich 109, 117; 393 NW2d 479 (1986).

If we apply the doctrine of equitable subrogation to the instant case, we find that it fits the situation quite well.

Mr. Smithingell was injured in a work-related motor vehicle accident. He received medical treatment and incurred medical expenses for which he was (primarily) liable. Bombalski, supra, 247 Mich App, at 542. For his accident, he had two medical insurance coverages – workers' compensation through his employer, Appellee Amoco, and no-fault personal protection insurance through his auto insurer, Appellant Auto-Owners. By operation of law, MCL 500.3109(1), Amoco bore the primary insurance responsibility, and

Auto-Owners was secondary or excess (see supra). However, Amoco, contesting coverage, declined to pay, so Auto-Owners stepped up to the plate and paid Mr. Smithingell's medical expenses.

In paying Mr. Smithingell's medical debts, Auto-Owners was obviously not acting as a mere volunteer – it was fulfilling its obligation as his (secondary or excess) insurer. See Specht, supra, 234 Mich App, at 296. Having paid the medical expenses of Mr. Smithingell, its insured, Auto-Owners became equitably subrogated to, stood in the shoes of, and enjoyed all the rights and remedies possessed by the subrogor, Mr. Smithingell. Mr. Smithingell enjoyed the right to primary medical coverage (workers' compensation) from Amoco, and, for Amoco's default, the full reimbursement remedy provided by MCL 418.315(1), supra.

Not only does the doctrine of equitable subrogation fit the instant case, this Court has specifically approved the application of equitable subrogation to situations like the instant case. In Commercial Union Ins Co v Medical Protective Co, supra, 426 Mich, at 112, this Court expressly held that "an excess insurer may sue a primary insurer as the equitable subrogee of the insured." That is this case. This is a classic equitable subrogation situation that mistakenly went unrecognized below. This is not a situation where this Court is being asked to stretch the doctrine to accommodate a new use, as in Atlanta International Ins Co v Bell, 438 Mich 512, 520-521; 475 NW2d 294 (1991).

Despite the foregoing analysis, the Court of Appeals rejected Auto-Owners' equitable subrogation argument in the instant case with the following 1-paragraph analysis:

> "Further, we reject plaintiff's argument that it should be subrogated to Smithingell's position. Plaintiff is subrogated only to the employee's rights, but if the employee does not pay for the medical services directly, then there is no right in the employee to full reimbursement for the insurer to assert by way of subrogation. See Auto Club Ins Ass'n v New York Life Ins Co, 440 Mich 126, 135-136; 485 NW2d 695 (1992) (the subrogee is equitably subrogated to the position of the insured and acquires only those rights held by the insured). Consequently, because Smithingell did not pay for his medical expenses and was not entitled to reimbursement under subsection 315(1), there is no right for plaintiff to assert."

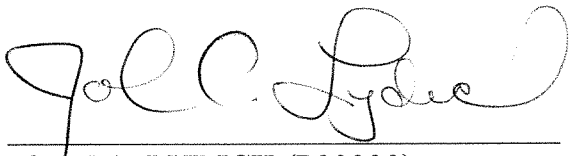
(245 Mich App, at 177).

The above-quoted rationale indicates that the Court of Appeals was obviously confused. If the Court's (exquisitely circular) analysis were correct, there would never be a case of equitable subrogation. In a nutshell, the Court is saying that Auto-Owners' equitable subrogation claim (i.e., as subrogee of Smithingell) is defeated by the fact that Smithingell (the subrogor) did not actually pay his own medical expenses. But if Smithingell had paid his own expenses, there would be no need for subrogation. Having paid the expenses for him, Auto-Owners is entitled, through equitable subrogation, to stand in his shoes and exercise his remedy of full reimbursement.

RELIEF

For all of the foregoing reasons, Amicus Curiae Auto Club requests that this Honorable Court reverse or modify all of the decisions below in this matter with respect to the issue of medical expense reimbursement and find that the remedial full-reimbursement provisions of § 315(1) of the WDCA apply to the medical expense reimbursement claim of Plaintiff-Appellant Auto-Owners.

Respectfully submitted,



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Dated: July 24, 2002